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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. YUNUS RAJABIY, Defendant and Appellant.	B279770 (Los Angeles County Super. Ct. No. PA086661)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed.

Kent D. Young, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Kathy S. Pomeranz, Deputy Attorneys General, for Plaintiff and Respondent.

Yunus Rajabiy appeals from his judgment of conviction of misdemeanor battery. He argues the prosecution violated his right to due process by failing to correct misleading witness testimony, and the court erred in allowing testimony about his arrest. He also argues the court should have instructed the jury on the lesser included offense of simple assault, and one of his conditions of probation is unconstitutionally overbroad. We find no reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

On the morning of June 25, 2016, Jessica Garibay was out jogging, when she saw appellant drive past her several times in a minivan. Appellant made "cat calls" and appeared to be whistling at Garibay. The minivan eventually stopped ahead of her. When Garibay reached it, appellant had his phone out of the window, and she thought he was recording her and masturbating. Garibay photographed the minivan's rear license plate with her cell phone and attempted to take a picture of appellant's face through the window, so she could report him.

Appellant threw a plastic milk bottle at her, opened the minivan door forcefully, got out, and told Garibay to delete the photo or give him her phone. In the 911 call she made from the scene, Garibay claimed she was hit by the bottle, but at trial, she was unsure whether the bottle or car door had hit her. At some point, appellant started video recording the encounter on his phone, and the video captured Garibay saying, "You just hit me. Look, I am shaking."[1]

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[1] The 911 call and video were played at trial, but have not been included in the record on appeal.

[1] Undesignated statutory references are to the Penal Code.

Garibay's phone fell on the ground, and the screen cracked. At trial, Garibay testified appellant "smacked" the phone out of her hand and kicked it when she tried to pick it up. However, the responding police officer, Judith Zuniga, testified that Garibay told her the phone fell when appellant "attempted to grab it." Officer Zuniga did not recall Garibay mentioning that appellant had kicked the phone. The investigating officer, Sergeant Timothy Kohl, testified Garibay mentioned the kicking of the phone for the first time in an interview on the day of the preliminary hearing in this case.

After Anthony Kemper, who lived nearby, intervened, Garibay managed to call 911. Appellant left the scene before police arrived, but was traced through the license plate photo and identified by Garibay. Later that day, appellant called police to explain he threw a bottle at someone who was taking pictures of him. When the officer who took the call told him he may have committed battery, appellant hung up.

On June 29, 2016, Sergeant Kohl called appellant and warned him there was a warrant for his arrest. The officer suggested appellant turn himself in, and appellant indicated he might, but did not. On July 3, 2016, Officer Brandon Seibert saw appellant's minivan at a motel on San Fernando Road, ran the license plate, and arrested appellant on the outstanding warrant.

Appellant originally was charged with attempted robbery (count 1), but that count was dismissed on the second day of trial. He was then charged with felony vandalism as to Garibay's cell phone (Pen. Code, § 594, subd. (a),[2] count 2) and misdemeanor battery (§ 242, count 3). The jury was instructed that the prosecutor had elected to proceed on count 3 based on appellant's

"throwing a milk container" at Garibay. Appellant was acquitted on count 2 and convicted on count 3. The court suspended imposition of a sentence and placed appellant on probation for three years, with terms and conditions, including that he serve 120 days in county jail, that he have no contact with Garibay and Kemper, and that he submit his person and property, including electronic devices, to search and seizure.

This appeal followed.

DISCUSSION

I

Appellant complains that his right to due process was violated by the prosecutor's failure to correct Sergeant Kohl's testimony that appellant did not surrender, which appellant claims was misleading. In a related argument, he claims to have been prejudiced by the admission of Officer Seibert's testimony that appellant was arrested at a motel four days after speaking with Sergeant Kohl.

In her opening statement, the prosecutor told the jury Sergeant Kohl was expected to testify that he told appellant to turn himself in because there was a warrant for his arrest, and Officer Seibert was expected to testify that appellant was arrested at a motel seven or eight days later. During trial, the defense moved to exclude Officer Seibert's testimony as irrelevant. The prosecutor argued that the circumstances of the arrest were relevant because appellant was found in possession of the same minivan that he had driven during his encounter with Garibay, and because appellant was hiding out at a motel when he knew there was a warrant for his arrest; she agreed not to

argue the latter point if the court thought the argument was tenuous.

Sergeant Kohl then testified to his June 29, 2016 conversation with appellant, in which he told appellant about the warrant for his arrest and suggested that he turn himself in. According to Sergeant Kohl, appellant said he "might come into the station, but he never did."

Before Officer Seibert was called, the court indicated its tentative was to allow him to testify about the arrest and to allow the parties to argue "whatever they want." In response, defense counsel argued that in the June 29, 2016 conversation with Sergeant Kohl, appellant had agreed to surrender the following week, but he was arrested before that time. Defense counsel played the recorded conversation for the court, and then stated that in the conversation Sergeant Kohl had told appellant, "If they don't pick you up, then come in next week."[3]

The prosecutor's take on the conversation was that appellant did not agree to surrender the following week but continued to negotiate throughout. The prosecutor insisted that Officer Seibert's testimony was necessary to authenticate photographs of appellant's minivan. She refused the defense's offer to stipulate the minivan belonged to appellant, but she agreed not to argue that appellant was hiding out at the motel at the time of his arrest. Defense counsel's objection that the testimony about appellant's arrest was irrelevant and cumulative was overruled.

Appellant contends that Sergeant Kohl's testimony was misleading because it insinuated that appellant was given a

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[3] The recorded conversation has not been included in the record on appeal.

chance "to self-surrender, and was arrested when he failed to do so," thus bolstering the prosecution's "consciousness-of-guilt theory," whereas his recorded conversation with appellant showed appellant was arrested "before the time for self-surrender."

Due process bars the prosecution from knowingly presenting false evidence and imposes a duty to correct the testimony of prosecution witnesses "that it knows, or should know, is false or misleading. [Citation.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 716.) Nor may the prosecutor present false or misleading argument. (*Ibid.*)

The problem with appellant's argument is that the recorded conversation on which he relies is not in the record, the attorneys disagreed about its contents, and defense counsel's own restatement of what Sergeant Kohl said made clear that appellant was told he could be arrested before the following week. Thus, appellant's assumption that he was given a specific time to self-surrender is inaccurate.

Similarly, appellant argues that Officer Seibert's testimony should have been excluded as more prejudicial than probative because identification was not an issue, and the fact that appellant was arrested at a motel created the impression that he was fleeing to avoid arrest. The trial court has "wide discretion in assessing whether in a given case a particular piece of evidence is relevant and whether it is more prejudicial than probative. [Citations.]" (*People v. Duff* (2014) 58 Cal.4th 527, 558.)

As she had told the court, the prosecutor used Officer Seibert to authenticate photographs of the minivan taken at the motel and to connect the minivan to appellant who had the keys

to that vehicle at the time of the arrest. She mentioned that the minivan was photographed at a motel only once and then broadly asked if appellant was located "at that area." Appellant has not shown that the authentication of the photographs of the minivan was cumulative of other evidence, or that the photographs were irrelevant. Nor has appellant shown that the single reference to the motel was unduly prejudicial. Appellant's assumption that it was is based on a speculative inference—that the reason appellant was in the motel area was because he was either fleeing or hiding. The prejudicial effect of that inference was alleviated by the prosecutor's agreement not to argue the point to the jury.

On this record, we find no evidentiary error or deprivation of due process.

II

Appellant argues the court erred in not instructing the jury sua sponte on the lesser included offense of simple assault (§ 240), based on Garibay's conflicting testimony at trial as to whether the milk bottle hit her.

A lesser included offense is necessarily included within a greater offense if the greater offense cannot be committed without also committing the lesser offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) Battery requires a touching of the victim, however slight the touching may be. (*People v. Dealba* (2015) 242 Cal.App.4th 1142, 1149–1150.) Simple assault is a lesser included offense of battery because an assault is "nothing more than an attempted battery." (*People v. Fuller* (1975) 53 Cal.App.3d 417, 421.)

"A trial court must instruct on a lesser included offense ""whenever evidence that the defendant is guilty only of the

lesser offense is "substantial enough to merit consideration" by the jury."" [Citation.] Substantial evidence in this context is evidence from which reasonable jurors could conclude that the lesser offense, but not the greater, was committed. [Citation.] When evaluating whether a lesser included offense instruction should have been given, we view the evidence in the manner most favorable to the defendant and apply an independent review standard. [Citations.]" (*People v. Mullendore* (2014) 230 Cal.App.4th 848, 856.) We determine only the "bare legal sufficiency," not the weight or credibility of the evidence supporting such an instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 177; *People v. Marshall* (1996) 13 Cal.4th 799, 847.)

At trial, Garibay initially testified that appellant threw "a chocolate bottle at me. But I—thankfully I was able to move and it didn't hit me." She immediately qualified her answer: "I don't—I don't know—I don't remember it hitting me. Or it might have hit me. It might have been the door. [¶] I'm not too sure. It was a while back." Later in her testimony, she said the bottle "hit the ground," and when the prosecutor asked her to clarify if she could recall being hit by the bottle, Garibay added: "I want to say it did. [¶] I know the door didn't hit me. I was hit by a bottle, but I am not sure whether it was that or the door. But I am almost most [*sic*] certain than not that it was the bottle."

Still later, the prosecutor asked Garibay if she had to do anything to avoid being hit by the bottle, and she answered: "Yeah. I moved to the side. I saw it coming and I kind of—" added that appellant forcefully opened the minivan's door seconds after he threw the bottle at her. The prosecutor then restated her testimony: "So when he throws the plastic bottle at you and then you dodge, he, within five seconds, opens his door? .

. . [¶] Do you have to do anything to avoid being hit by the door?" Garibay answered that she "moved further back." Asked how she knew the bottle contained chocolate milk, Garibay said that "once he threw it on the floor, it splashed and I saw chocolate milk."

After the 911 call was played for the jury, the prosecutor commented that "listening to this audio, it sounds like you are saying that the bottle did hit you." Garibay agreed, and added: "But I didn't want to say for certain because I didn't—I wasn't for sure, so I didn't want to say something I wasn't certain on."

Viewed in appellant's favor and without determining their weight and credibility, some of Garibay's statements at trial suggested she avoided being hit by the bottle by moving to the side. Those statements supported an instruction to the jury on the lesser included offense of assault since a battery would not have been completed unless Garibay was hit by the bottle.

But even assuming that the failure to instruct the jury on simple assault was error, that error "is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 837, and . . . evidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given. [Citations.]" (*People v. Banks* (2014) 59 Cal.4th 1113, 1161, overruled on another ground in *People v. Scott* (2014) 61 Cal.4th 363, 391, fn. 3; see also *People v. Breverman*, *supra*, 19 Cal.4th at p. 165.) "Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the

evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Breverman*, at p. 177.)

Appellant argues that Garibay's own testimony at trial is substantial evidence that the bottle did not hit her. That, however, is not the standard under *People v. Watson*, *supra*, 46 Cal.2d 818. Evidence "substantial enough to warrant lesser offense instructions in the first place" is not necessarily "strong enough to affect the outcome had the instructions not been omitted." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 177.) The totality of Garibay's trial testimony indicates she could not remember exactly what had hit her—whether the bottle or the car door, but after hearing the recorded 911 call she confirmed it was the bottle. The video taken by appellant and the 911 call, both nearly contemporaneous with the crime, indicated (in the prosecutor's restatement of their substance on the record) that Garibay was hit, and that she was hit by the bottle. Thus, despite Garibay's confusion at trial, it was not reasonably probable that the jury would have found appellant guilty only of simple assault.

Appellant's argument that both the court and the prosecutor misled the jury into concluding that battery could be completed by throwing a bottle at Garibay without actually touching her is not persuasive. The court's instructions must be evaluated as a whole. (*People v. Holt* (1997) 15 Cal.4th 619, 677.) Even if the unanimity instruction was incomplete, the battery instruction included the touching element. Similarly, although in closing the prosecutor skipped over that element, she clearly identified it in rebuttal.

That the jury returned a split verdict on counts 2 and 3 is not dispositive, and *People v. Mullendore*, *supra*, 230 Cal.App.4th 848, on which appellant relies, is distinguishable. The defendant in that case shattered a car window with his backpack after the driver honked at him for standing in the street. (*Id.* at pp. 851–852.) The defendant was charged with assault by means of force likely to cause great bodily injury, but the jury convicted him of the lesser included offense of misdemeanor simple assault. The jury was not instructed on the lesser included misdemeanor offense of throwing a substance at a vehicle. The defendant was convicted, as charged, of throwing a substance at a vehicle that is capable of causing serious bodily harm and with intent to cause great bodily injury, a felony. (*Id.* at p. 853; see Veh. Code, § 23110, subds. (a) & (b).) It was in that context that the appellate court noted: "Because the jury had doubts concerning defendant's use of (or ability to apply) force likely to produce great bodily injury . . . , there is a reasonable probability it also had doubts about whether defendant had the intent to inflict such injury." (*Mullendore*, at p. 857.)

Here, by contrast, counts 2 and 3 were based on different alleged conduct: hitting Garibay with a bottle and breaking her phone. That appellant was acquitted of the vandalism charge as to the phone does not mean the jury had doubts about the battery charge as to the bottle. If anything, the split verdict indicates the jury consistently credited Garibay's statements at the scene of the crime, where she mentioned being hit by the bottle but did not mention that appellant slapped the phone out of her hand or kicked it, over her inconsistent statements at trial.

Based on the entire record, appellant was not prejudiced by the lack of a simple assault instruction.

III

Appellant challenges the condition that he "submit [his] person and property to search and seizure at any time of the day or night by any peace officer, including electronic devices" as facially overbroad.[4] He argues that the condition must as a matter of law be expressly limited to searches for "material prohibited by law" or "evidence of illegal conduct."

Since appellant did not object to the search condition in the trial court, on appeal he may make only a facial overbreadth challenge that raises pure issues of law and does not require consideration of the facts of his particular case. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889.) We review such a challenge de novo. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143.)

Appellant relies largely on *People v. Appleton* (2016) 245 Cal.App.4th 717, a case decided after *Riley v. California* (2014) ___ U.S. ___, 134 S.Ct. 2473 invalidated warrantless cell phone searches. Even though *Riley* was not a probation search case, the court in *Appleton*, following *Riley*'s reasoning regarding the

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[4] The minute order states this condition differently, requiring appellant to submit his "person and property to search and seizure at any time of the day or night, by any probation officer or other peace officer, with or without a warrant, probable cause or reasonable suspicion." Ordinarily, where there is a discrepancy between the reporter's transcript and the clerk's minute order, "[t]he record of the oral pronouncement of the court controls over the clerk's minute order. . . . [Citations.]" (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [relying on oral pronouncement of probation conditions].) The minute order must be amended to conform to the court's oral pronouncement. (See *People v. Zackery* (2007) 147 Cal.App.4th 380, 385 [clerk's minutes must accurately reflect what occurred at hearing].)

wealth of personal information that can be stored on electronic devices, rejected an electronics-search condition as overbroad because it allowed the search of "vast amounts of personal information unrelated to defendant's criminal conduct or his potential future criminality." (*Appleton*, at p. 727.) Currently, there is a split of authority regarding the validity of broad electronics-search conditions of probation, and the issue is pending before the California Supreme Court.[5]

The problem with appellant's reliance on cases that have invalidated electronics-search conditions of probation is that the courts in those cases were presented with preserved as-applied challenges to such conditions, requiring an examination of "the facts and circumstances in each case." (See, e.g., *People v. Bryant*, *supra*, 10 Cal.App.5th at p. 402, *People v. Appleton*, *supra*, 245 Cal.App.4th at pp. 722–723; but see *In re P.O.* (2016) 246 Cal.App.4th 288, 297 [exercising discretion to reach forfeited as-applied challenge].) That is not our case.

Appellant's additional argument that the search condition must be based on reasonable suspicion of illegal conduct also is

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[5] See *People v. Trujillo* (2017) 15 Cal.App.5th 574, fn. 1, citing *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937.

not persuasive. Assuming the condition imposed in this case permits suspicionless searches, such searches of probationers are allowed under California law. "When involuntary search conditions are properly imposed, reasonable suspicion is no longer a prerequisite to conducting a search of the subject's person or property. Such a search is reasonable within the meaning of the Fourth Amendment as long as it is not arbitrary, capricious or harassing." (*People v. Reyes* (1998) 19 Cal.4th 743, 752.) "The purpose of an unexpected, unprovoked search of defendant is to ascertain whether he is complying with his terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law." (*People v. Kern* (1968) 264 Cal.App.2d 962, 965, quoted with approval in *Reyes*, at p. 752.)

United States v. Knights (2001) 534 U.S. 112, on which appellant relies in reply, does not require that search conditions be expressly limited to searches on reasonable suspicion of illegal conduct. The *Knights* court reviewed a search pursuant to a probation condition that, like the condition included in the minute order in this case, expressly allowed warrantless and suspicionless searches. (*Id.* at p. 114.) The court found the search valid because it was supported by reasonable suspicion and declined to consider the constitutionality of the suspicionless searches permitted by the condition. (*Id.* at pp. 120, 121 & fn. 6.) Since *Knights* did not review the constitutionality of a suspicionless search condition, it does not stand for the proposition that such a condition is unconstitutional. Nor did *Knights* consider whether probationers completely waive their Fourth Amendment rights when consenting to warrantless search conditions, as the California Supreme Court has held. (See *Knights*, at p. 118; *People v. Woods* (1999) 21 Cal.4th 668,

674–675.) Cases are not authority for propositions not considered. (*People v. Avila* (2006) 38 Cal.4th 491, 566.)

We conclude that the search condition imposed by the court is not unconstitutionally overbroad on its face.

DISPOSITION

The judgment is affirmed. The minute order shall be amended to conform to the trial court's oral pronouncement of the search and seizure probation condition.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.